(1)
Supreme Court, U.S.
FILED
00 404 SEP 13 2000
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

JULIE DUNCAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

TOM TINKHAM
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2829

PAUL M. SMITH *
MICHAEL B. DESANCTIS
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

DAVID P. SANDERS
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Petitioner

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

569

QUESTION PRESENTED

Section 105(a)(1) of the Airline Deregulation Act preempts all state laws and regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41713(b)(1). The question presented is whether the court below erred when it held, in conflict with other courts of appeals, that a state may regulate any "service" provided on an international or interstate flight if the service does not involve price or route determinations.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of this case contains the names of all parties that were before the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington.

Petitioner Northwest Airlines, Inc. is an indirect, wholly owned subsidiary of Northwest Airlines Corporation, a publicly traded company. As of December 31, 1999, based on a Schedule 13G filed with the Securities and Exchange Commission, AXA Financial, Inc. (formerly known as the Equitable Companies Incorporated), through subsidiaries and affiliates, had a beneficial ownership of more than 10% of the common stock of Northwest Airlines Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 6

I. The Circuits Are in Fundamental and Irreconcilable Conflict Over the Proper Interpretation of the ADA Preemption Provision. 9

A. The Emergence and Scope of the Conflict 9

B. The Practical Impact of the Conflict 19

II. The Ninth Circuit's Rules Are Particularly Problematic Because They Expose Airlines to Forms of State Regulation Congress Clearly Intended to Preempt. 21

CONCLUSION 24

APPENDIX A

Opinion, *Duncan v. Northwest Airlines, Inc.*, No. 98-35617 (9th Cir. Apr. 6, 2000) 1a

APPENDIX B

Order, *Duncan v. Northwest Airlines, Inc.*, No. C98-130Z (W.D. Wash. June 5, 1998) 9a

APPENDIX C

Order on Petition for Rehearing, *Duncan v. Northwest Airlines, Inc.*, No. 98-35617 (9th Cir. June 16, 2000) 19a

APPENDIX D

Statutory Provision Involved 20a

APPENDIX E

Class Action Complaint for Injunctive Relief, Medical Monitoring and Damages, *Duncan v. Northwest Airlines, Inc.*, No. 98-2-01158-1SEA (Super. Ct. Wash. filed Jan. 13, 1998) 22a

TABLE OF AUTHORITIES

CASES

Abdu-Brisson v. Delta Airlines, Inc., 128 F.3d 77 (2d Cir. 1997) 17, 18

Abdullah v. American Airlines, Inc., 181 F.3d 363 (3d Cir. 1999) 16

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) 6, 10, 16, 22

Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998), *amended*, 169 F.3d 594 (9th Cir. 1999) ..... *passim*

Chukwu v. Board of Directors of British Airways, 889 F. Supp. 12 (D. Mass. 1995), *aff'd mem.*, 101 F.3d 106 (1st Cir. 1996) 14

Exxon Corp. v. Hunt, 475 U.S. 355 (1986) 21

Galbut v. American Airlines, Inc., 27 F. Supp. 2d 146 (E.D.N.Y. 1997) 11, 14

Hobbs v. Labor Commission, 991 P.2d 590 (Utah Ct. App. 1999) 10

Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995) ..... *passim*

Kungys v. United States, 485 U.S. 759 (1988) 21

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) ..... *passim*

Newman v. American Airlines, Inc., 176 F.3d 1128 (9th Cir. 2000) 19

O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989) 12

Parise v. Delta Airlines, Inc., 141 F.3d 1463 (11th Cir. 1998) 14

Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998) 8, 14, 20

Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186 (3d Cir. 1998) 10, 16

Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996) 13

United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605 (7th Cir. 2000) 18, 19, 20

Woodson v. U.S. Airways, Inc., 67 F. Supp. 2d 554 (M.D.N.C. 1999) 10, 11, 22

STATUTES AND ADMINISTRATIVE MATERIALS

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1332(a) 2

28 U.S.C. § 1441 2

28 U.S.C. § 1446 2

49 U.S.C. § 41713(b)(1) 2, 3, 6

49 U.S.C. App. § 1506 16

14 C.F.R. Part 252 3

44 Fed. Reg. 9948 (Feb. 14, 1979) 11, 12, 22, 23

49 Fed. Reg. 25408 (June 20, 1984) 21

65 Fed. Reg. 36772 (June 9, 2000) 3, 4

IN THE

Supreme Court of the United States

No. _____

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

JULIE DUNCAN,

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Northwest Airlines, Inc. ("Northwest") respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. In that decision, the Ninth Circuit adopted an interpretation of the Airline Deregulation Act that conflicts both with the rule in other circuits and with the intent of Congress because it allows states to regulate or prohibit any airline policy regarding a "service" not directly related to fares or routes, even if the policy was adopted in order to compete in the deregulated marketplace Congress sought to foster.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, reported at 208 F.3d 1112 (9th Cir. 2000), is reprinted at Pet. App. 1a. The unreported order of the United States District Court for the Western District of Washington is reprinted at Pet. App. 9a. The unpublished order of the United States Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc* is set forth at Pet. App. 19a.

JURISDICTION

Northwest properly removed this suit to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. §§ 1441, 1446. Jurisdiction in the district court was proper under 28 U.S.C. § 1332(a). The Ninth Circuit had jurisdiction to review the district court's dismissal of the case pursuant to 28 U.S.C. § 1291. The Ninth Circuit issued its decision on April 6, 2000. Northwest timely filed a petition for rehearing and rehearing *en banc*, which was denied on June 16, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves section 105(a)(1) of the federal Airline Deregulation Act ("ADA"), now codified at 49 U.S.C. § 41713(b)(1), which provides as follows:

> Preemption – Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Pet. App. 20a.

STATEMENT

Petitioner Northwest Airlines seeks review of a ruling by the Ninth Circuit that dramatized and exacerbated a long-standing and explicit conflict among the circuits over the proper interpretation of section 105(a)(1) of the ADA, 49 U.S.C. § 41713(b)(1), in which Congress preempted any provision of state law relating to an airline's "price, route, or service." Because that conflict will not disappear absent action by this Court, and because the current disarray in the law is both unworkable – from the point of view of airlines operating in an interstate environment – and inconsistent with the will of Congress, the argument for a grant of review in this case is compelling.

This case was filed by a flight attendant in state court in Washington, alleging, on behalf of a proposed class of flight attendants on Northwest's trans-Pacific flights, that Northwest was liable under state tort law for allowing passengers to smoke on those flights. At the time the action was filed, Northwest did not allow smoking on domestic flights or on many international flights but, consistent with federal regulations,[1]

---

[1]Under 14 C.F.R. Part 252, federal authorities have regulated on-board smoking for decades. Until this year, those federal regulations permitted smoking on international flights, subject to certain restrictions. This past June, the regulations were amended to ban smoking on flights of domestic air carriers originating or terminating in the United States. 65 Fed. Reg. 36772 (June 9, 2000). A similar ban applicable to foreign air carriers is subject to potential waiver if the applicable foreign governments object to

did allow smoking on some Asian flights. It was acknowledged by respondent, Pet. App. 22a-23a, that Northwest adopted this service policy because it was necessary to compete with foreign air carriers that allowed smoking on the same routes. Respondent alleged that this service policy was, nevertheless, a breach of Northwest's duty, under state tort law, to provide a safe and healthy working environment.

The case was removed to federal court, and the district court dismissed the case as preempted by section 105(a)(1), reasoning that allowing respondent's tort claim to proceed would be tantamount to allowing state regulation of a "service" provided to Northwest customers on trans-Pacific flights. Pet. App. 15a-17a. The district court's ruling was based on then-applicable Ninth Circuit case law, which in turn was based on the Fifth Circuit's *en banc* ruling in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995). Pet. App. 12a-17a (citing *Gee v. Southwest Airlines*, 110 F.3d 1400, 1404-07 (9th Cir. 1997), *overruled on other grounds by Charas v. Trans World Airlines Co.*, 160 F.3d 1259 (9th Cir. 1998)). *Hodges*, in essence, established the rule that states may not regulate airline decisions about "services," broadly defined, but that tort suits challenging the manner in which a service was performed on a given day are permissible. While the case was pending on appeal, however, the Ninth Circuit issued an *en banc* decision in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), *amended*, 169 F.3d 594 (9th Cir. 1999), which radically altered the governing standards in that circuit.

---

the extraterritorial application of United States law. *Id.* During the pendency of this case, but prior to the imposition of the new federal regulations, Northwest made a decision to ban smoking on all flights, including those to and from Asia.

Charas started with the proposition that the ADA preemption provision should be interpreted in light of the congressional goal of shielding the newly deregulated airlines from re-regulation by the states. It then held that preemption of "run-of-the-mill personal injury claims" arising from negligent operations would not further the goal of preserving deregulation and promoting competition. 160 F.3d at 1261. Finally, the court concluded that the only way to limit the scope of section 105(a)(1) (and thus save personal injury claims from preemption) is to interpret the term "service" in that section as adding nothing to the prior terms "price" and "route." As a result, although section 105(a)(1) preempts state laws that relate to an airline's "price, route *or* service," (emphasis added) the *Charas* court interpreted "service" as encompassing only matters that would already be preempted as involving airline "routes" – "such things as the frequency and scheduling of transportation, and . . . the selection of markets to or from which transportation is provided," *Id.* at 1265-66. Because that definition of "service" conflicted with *Hodges*, *Charas* expressly overruled two Ninth Circuit cases that had relied on *Hodges*, and the opinion acknowledged that it was creating a direct conflict with *Hodges*. *Id.* at 1261, 1263.

In the present case, a panel of the Ninth Circuit then applied *Charas*, not to a "run-of-the-mill personal injury claim," *id.* at 1261, but to a claim challenging an airline service *policy* of allowing smoking on certain flights. It held that such a policy was also fully exposed to state regulation through tort law. In so doing, the Ninth Circuit underscored its position about the superfluousness of the term "service" in the statute. Writing for the panel, Judge Reinhardt stated that the Northwest policy of allowing smoking on trans-Pacific flights did not involve a "service" protected from state regulation, because it was not "a decision dealing with 'the frequency and

scheduling of transportation, [or] the selection of markets to or from which transportation is provided.'" Pet. App. 5a (quoting *Charas*, 160 F.3d at 1265-66).

Thus, the court applied a definition of "service," which it initially adopted in *Charas* for the stated purpose of limiting preemption to matters that affect airline competition, to preserve a state-law challenge to an airline service policy that was implemented by Northwest in order to "meet the competition." And it then went further, holding that a state-law tort claim would not be preempted even if it could be shown to have the potential to force an airline to re-route its flights to another state in order to avoid liability. The court explained that such a causal connection to airline "routes" would be "too tenuous" to warrant preemption. Pet. App. 6a-7a. Thus, in the wake of the ruling below, the only state tort claims that would be preempted under section 105(a)(1) would be claims directly challenging an airline's decision to set a particular price or fly a particular route.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance concerning the proper interpretation of section 105(a)(1) of the ADA, which preempts any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). Since this Court's decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), serious and persistent disagreements have emerged in circuit court cases applying section 105(a)(1) to state tort claims. Those disagreements include both divergent views about the basic mode of analysis that should be applied and a specific conflict over the meaning

of the statutory term "service." This conflict will not resolve itself because the two principal approaches to interpreting the statute are based on *en banc* rulings of the Fifth and Ninth Circuits, each of which has been repeatedly endorsed by other circuits. As a result, absent intervention by this Court, airlines will continue to have to deal with two quite distinct legal regimes, depending on which circuit's law happens to apply.

The evident confusion in the lower courts would be reason enough to justify a grant of review even if both of the competing rules were arguably defensible. But the problem is even more serious because, as this case illustrates, the Ninth Circuit has adopted such a narrow interpretation of the ADA preemption provision that the statutory goals of Congress are being frustrated. It is the Ninth Circuit that strongly emphasized in *Charas* the need to apply section 105(a)(1) with an eye to the congressional goal of promoting competition among the airlines in a newly deregulated environment. But in its zeal to limit the scope of preemption to matters affecting competition, the Ninth Circuit in *Charas* went much too far when it excluded from preemption all tort claims – and all other forms of state regulation – not directly related to an airline "price" or "route."

The effect of that exclusion was dramatized in this case, where the Ninth Circuit confirmed its rule that the third statutory term – "service" – is always treated as mere surplusage, adding nothing to the scope of the preemption provision, even where such a narrow statutory interpretation flatly *disserves* the congressional goal of promoting free competition. Thus, in the Ninth Circuit, state regulation of airline policies relating to smoking, service of alcohol, overbooking, boarding of passengers and other matters not directly involving prices or routes may proceed unfettered,

even where the policies subject to attack were adopted for the sole purpose of "meeting the competition." Meanwhile, in several other circuits, it is well established that such state law causes of action would be preempted. *See, e.g., Hodges*; *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998).

The ruling below also extended *Charas* in another extraordinary way. The Ninth Circuit held that, even if a cause of action under a state's tort law were so burdensome that it effectively forced airlines to alter their routes to avoid that state, that would not be enough to justify preemption. Here again, it seems likely that the court's rule will disserve the statutory goals – and it is certain that other circuits applying section 105(a)(1) would not ignore the practical but indirect impact of a state law on airline route decisions.

The inevitable result of allowing the circuit conflicts to linger will be to leave in place a checkerboard of state regulation, requiring airlines to vary their policies from place to place as they attempt to compete for passengers while adhering to the most restrictive state rule that might be applied to a given flight between two different states. The Court should step in to restore uniformity in an area where it is a practical necessity. This case, involving an airline policy that was adopted for the purpose of competing with foreign carriers and would be shielded from preemption under one of the competing approaches to interpreting the Act but not the other, provides an excellent and timely vehicle for addressing these important issues.

I. The Circuits Are in Fundamental and Irreconcilable Conflict Over the Proper Interpretation of the ADA Preemption Provision.

A. The Emergence and Scope of the Conflict

The conflict among the circuits at issue here involves forms of state regulation not at issue in the two cases where this Court applied the ADA preemption provision and established a basic framework for the preemption analysis. First, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992), the Court held that section 105(a)(1) bars states from enforcing their general consumer protection statutes through state-created guidelines aimed at prohibiting false and misleading airfare advertising. The *Morales* Court recognized that Congress in the ADA sought to place "'maximum reliance on competitive market forces'" and intended the preemption provision "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378 (quoting 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)) (alterations in original). The Court then noted that the words of section 105(a)(1) "express a broad preemptive purpose," *id.* at 383, and therefore rejected the argument that the ADA preempted only state laws that specifically address the airline industry. Instead, the Court made clear that the ADA's preemption provision applies with equal force to general laws that are "not specifically designed to affect" rates, routes, or services but have such an effect directly or indirectly. *Id.* at 386 (internal quotation and citation omitted).

Applying this analysis, the Court recognized that, while "'[s]ome state actions may affect [airline fares] in too tenuous, remote or peripheral a manner' to have preemptive effect," *id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100

n.21 (1983)) (alteration in original), "the obligations imposed by the [advertising] guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Id.* Accordingly, the state advertising regulations were preempted.

Three years later, in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), this Court dealt with state law challenges to an airline's retroactive modification of its frequent flyer program. The Court held that the plaintiffs' fraud claims were preempted. *Id.* at 228.[2] Applying the language of section 105(a)(1), it concluded that those claims related both to the airline's "rates," in the form of mileage credits for free tickets, and to the "service" of access to flights and class upgrades. *See id.* at 226.

In the wake of *Morales* and *Wolens*, a striking conflict among the circuits has developed concerning the proper application of section 105(a)(1) to other kinds of state law tort claims and concerning the meaning of the term "service" in that section. *See, e.g., Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 192 (3d Cir. 1998) ("In the absence of definitive guidance from the Supreme Court, the Courts of Appeals have struggled with the relationship between the [Airline Deregulation] Act's preemption clause and state tort claims."); *Hobbs v. Labor Comm'n*, 991 P.2d 590, 594 n.6 (Utah Ct. App. 1999) ("Currently there is no single interpretation of what is encompassed by the term 'service' [in the ADA]."); *Woodson v. U. S. Airways, Inc.*, 67 F. Supp. 2d

[2]The Court held that the plaintiffs' contract claims were not preempted, however, because a state's enforcement of private contractual obligations simply holds parties' to their own agreements and does not constitute a "law" relating to a price, route or service of an air carrier within the meaning of the ADA's preemption clause. *See Wolens*, 513 U.S. at 228-33.

554, 557 (M.D.N.C. 1999) ("courts interpreting the scope of preemption under the ADA have failed to reach consistent results"); *Galbut v. American Airlines, Inc.*, 27 F. Supp. 2d 146, 151 (E.D.N.Y. 1997) ("Based on the *Morales* ruling, the scope of the word 'services' has proven critical in preemption analysis with respect to tort claims, although no singular definition has emerged despite repeated scrutiny" (citing cases)).

One leading interpretation was enunciated by the *en banc* Fifth Circuit in *Hodges*. There, the plaintiff brought a personal injury tort suit for injuries suffered when an object fell out of an overhead bin. In determining whether the plaintiff's claim "related to a price, route or service of an air carrier," the *Hodges* court defined the term "service" broadly as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with contractual arrangement between the airline and the use of the service. *Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling*, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper of the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as "services" and broadly to protect from state regulation.

44 F.3d at 336 (emphasis added and alteration in original).[3]

[3] This definition was derived in large part from statements issued by the Civil Aeronautics Board ("CAB") implementing section 105(a)(1). 44 F.3d at 337. According to the CAB,

Next, drawing on this Court's *Morales* decision, *Hodges* held that only those tort claims that make specific reference to airline services or "significantly affect" such services are preempted. *Id.* at 340. Applying this standard in light of its broad definition of "services," the court then distinguished between tort claims that concern an airline's *policy* of providing a given service and those that go only to the *manner* in which those services are provided. Only the former would "significantly affect" the airline's services and be preempted. *Id.* at 339-40. The latter, which the court characterized as claims concerning the "operation and maintenance" of the aircraft, would not. *Id.*

As an example of tort claims preempted under this standard, the court reaffirmed its earlier holding in *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989). There, the plaintiffs, who had been removed from a flight for being intoxicated and disruptive, sued under state tort law for having been wrongfully evicted from the flight. According to the *Hodges* court, the *O'Carroll* plaintiffs' claims were properly held preempted: "[e]nforcement of O'Carroll's state law claims would result in significant de facto regulation of the airlines'

> [P]reemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate finance. . . . [A] state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be "service" regulation within the meaning of section 105.

44 Fed. Reg. 9948, 9951 (Feb. 14, 1979).

boarding practices and, moreover, would interfere with federal law granting the airlines substantial discretion to refuse to carry passengers." 44 F.3d at 339 (citing 49 U.S.C. App. § 1511(a)).

By contrast, the personal injury negligence claim in *Hodges* related not to the airline's policy concerning its baggage services, but only to the manner in which those services were rendered. Accordingly, the plaintiff's claim would not "significantly affect" the airline's baggage services within the meaning of the ADA and was not, therefore, preempted. *Id.* at 340.

Hodges was followed by the Seventh Circuit in *Travel All Over The World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996). There, after noting the considerable confusion in the lower courts over the ADA's preemptive reach, *see id.* at 1433 (citing cases arriving at inconsistent results in slander and defamation cases), the court adopted the Fifth Circuit's broad definition of "service" as used in section 105(a)(1) of the ADA. *Id.* In addition, the court held, consistent with the Fifth Circuit's analysis in *Hodges*, that a claim relates to an airline's services and therefore is preempted if it has a "significant economic effect" on those services. *Id.* at 1432-33.

Applying this test, the Seventh Circuit held that the plaintiff travel agency's slander and defamation claims against an airline were not preempted. *See id.* at 1433. By contrast, the court held that the plaintiff's intentional tort claims, based on the airline's refusal to honor the tickets issued by plaintiff, were preempted because they "expressly referr[ed] to airline 'services,' which include ticketing as well as the transportation itself." *Id.* at 1434.

The Eleventh Circuit has also adopted the Seventh Circuit's "significant economic effect" test, originally derived from *Hodges*. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998) (citing *Travel All Over the World*, 73 F.3d at 1431). And the Fourth Circuit has likewise expressly adopted the broad definition of "service" announced in *Hodges*. In *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998), the plaintiff passenger sued the defendant airline for intentional torts and breach of contract arising out of the airline's refusal to allow him to board after he failed to produce proper identification. Citing *Hodges*, the court concluded that, "[u]ndoubtedly, boarding procedures are a service rendered by an airline." *Id.* at 259 (citing *Hodges*, 44 F.3d at 336; *Chukwu v. Bd. of Dirs. of British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995), *aff'd mem.*, 101 F.3d 106 (1st Cir. 1996)). Thus, to the extent that the plaintiff's intentional tort claims were based on the airline's "boarding practices," they were preempted. *Id.* Consistent with *Hodges*, however, the court also made clear that, in contrast to claims concerning an airline's policies or practices, "[s]uits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates or is unnecessary to an airline's services." *Id.* (citing *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 222, 224 (S.D.N.Y. 1994)).[4]

---

[4] A number of federal district courts in other circuits have adopted and applied the definitions and reasoning of the Fifth, Seventh, Fourth and Eleventh Circuits. *See e.g.*, *Chukwu v. Bd. of Dirs. of British Airways*, 889 F. Supp. 12, 13-14 (D. Mass. 1995), *aff'd mem.*, 101 F.3d 106 (1st Cir. 1996) (citing *Hodges* and adopting Fifth Circuit's definition of services); *Galbut*, 27 F. Supp. 2d at 152 (citing *Travel All Over The World* to support proposition that upgrade is a "service").

As noted above, the *en banc* Ninth Circuit in *Charas* broke ranks with all of these circuits that have followed the *Hodges* approach. Unlike the Fifth and Seventh Circuits' "significant economic effect" test, the test fashioned in *Charas* limits the ADA's preemptive force to state laws "adversely affect[ing] the economic deregulation of the airlines and forces of competition within the airline industry." 160 F.3d at 1261. Moreover, the court went on to hold that "[l]ike 'rates' and 'routes,' Congress used 'service' in § 1305(a)(1) in the public utility sense -- i.e., the provision of air transportation to and from various markets at various times." *Id.* at 1266. The court explained:

> Congress used the word "service" in the phrase "rates, routes, or service," in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the Act, "service" was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.

Id. at 1261. Elsewhere, the court explained that ""service,' when juxtaposed to 'rates' and 'routes,' refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, 'This airline provides service from Tucson to New York twice a day.')"). *Id.* at 1265-66.

In addition to adopting this narrow definition of "service" – one that renders the term virtually synonymous with the word "route" – the Ninth Circuit in *Charas* also expressly rejected as unworkable the *Hodges* court's distinction between an airline's policy to provide a service and the performance of a service through the "operation and maintenance" of its aircraft.

Id. at 1263 (citing and expressly rejecting *Hodges*, 44 F.3d at 336-37).

The Ninth Circuit's analysis was adopted by the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998). After exhaustively surveying the disagreements among the circuits, the Third Circuit chose to follow *Charas* and held that "the proper inquiry is whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation." *Taj Mahal Travel*, 164 F.3d at 194 (citing *Charas*, 160 F.3d at 1265-66). Thus, like the Ninth Circuit, the Third Circuit broadly concluded that "preemption is inappropriate in the tort field."[5] *Id.* The Third Circuit further joined in the Ninth Circuit's rejection of the Fifth Circuit's distinction between service policies and the operation of the aircraft. *Id.*[6]

Now, in the instant case, the Ninth Circuit has exacerbated the interpretive rift between it and some of its sister circuits.

---

[5]The Third Circuit found support for this proposition in the savings clause of the Federal Aviation Act ("FAA"), 49 U.S.C. App. § 1506. 164 F.3d at 194. *But see Morales*, 504 U.S. at 384-85 (rejecting argument that Court could look to FAA's savings clause for guidance in applying the ADA's preemption provision to tort claims); *Wolens*, 513 U.S. at 232 (ADA's preemption provision and FAA's savings clause together permit states to enforce contracts made by airlines but prevents states from "imposing their own substantive standards with respect to rates, routes, or services" through application of their tort law).

[6]Compounding the prevailing confusion, while the Third Circuit joined the Ninth Circuit's analysis in *Charas*, which was motivated by a desire to avoid preemption of routine personal injury claims, the Third Circuit held more recently in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999), that the entire field of airline safety is preempted as a matter of field preemption under the FAA.

Applying *Charas*'s definition of "services," Judge Reinhardt stated that an airline's deliberate policy of allowing smoking is not a "service" protected from state regulation by the ADA because "[a]n airlines' decision to permit (or not to permit) smoking on a flight is not a decision dealing with 'the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided.'" Pet. App. 5a (alteration in original) (quoting *Charas*, 160 F.3d at 1265-66).[7]

The Ninth Circuit then went on to create a bright-line rule that the threat of a state-law personal-injury action can never have a sufficient impact on airlines operating to justify preemption – *i.e.*, that "the connection between an award in a tort case and an airline's 'services' is simply too tenuous" to justify preemption under the ADA. Pet. App. 6a-7a. In so doing the court made clear that, even where it could be demonstrated that the application of state tort law *would* significantly impact an airline's services by forcing it to re-route its flights, the "causal relationship" between a tort suit and the airline's routes and services "is not sufficient to invoke preemption under § 1305(a)(1)." *Id.* at 6a.[8]

---

[7]This conclusion is patently at odds with CAB regulations implementing the ADA. *See supra*, p. 12 n.3.

[8]The Second Circuit has adopted somewhat of a hybrid rule, combining elements of the Ninth and Third Circuits' approach with that of the Fifth, Seventh, Fourth and Eleventh Circuits. In *Abdu-Brisson v. Delta Airlines, Inc.*, 128 F.3d 77 (2d Cir. 1997), it held, like the Ninth Circuit, that the primary focus of the preemption analysis must be congressional intent, which it characterized as preempting laws that "affect competition between airlines." *Id.* at 84. At the same time, however, the court rejected application of any bright-line rule and insisted on a case-by-case approach to ascertain "whether the dangers and hardships of diverse regulation justify

(continued...)

Given the depth of the disagreement among the circuits, there is little reason to suppose that the conflict will resolve itself. For example, the Ninth Circuit in this case declined to review *en banc* the panel's rather extreme application of *Charas*. And in *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the Seventh Circuit recently had occasion to comment on the circuit conflict, and pronounced that "nothing any other circuit has said about the subject persuades us to alter course." *Id.* at 609. Specifically, the court reaffirmed the broader test it had adopted in *Travel All Over The World*, providing that a claim is preempted if either the state['s] rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have 'a significant economic effect upon them.'" *Id.* (quoting *Travel All Over The World*, 73 F.3d at 1432). In doing so, the court expressly rejected the Third Circuit's more restrictive formulation (borrowed from the Ninth Circuit's decision in *Charas*) that "state law is preempted by § 105(a)(1) only if it 'frustrate[s] Congressional intent [or] impose[s] a state utility-like regulation on the airlines.'" *Id.* at 608-09 (quoting *Taj Mahal Travel*, 164 F.3d at 195) (alteration in original).[9] Indeed, the Seventh Circuit concluded that the ADA's preemption provision "applies according to its text, rather than according to goals and motives imputed to legislators," and thus preempts

---

[8](...continued)
foreclosing a State from the exercise of its traditional powers." *Id.* (internal quotations omitted). Thus, unlike the Ninth Circuit's rigid formulation, the Second Circuit's analysis made clear that, if application of a state's tort-like human rights laws did in fact frustrate Congress's deregulatory goals, that application of state law would be preempted under the ADA. *Id.* at 84-86.

[9]As the *Mesa Airlines* court recognized, the general anti-fraud statute held preempted in *Wolens* was "a long distance from 'utility-like regulation.'" *Id.*

even claims not inconsistent with the intent of Congress in enacting the ADA. *Id.* at 611 (citing *Wolens*).

B. The Practical Impact of the Conflict

There is a pressing need for action by this Court to resolve the conflicts among the circuits. The circuits' dramatically differing interpretations of section 105(a)(1) have real and immediate implications for the entire airline industry.

A good example is the area of an airline's boarding policies. In the Ninth Circuit, there is no preemption of state regulation of any airline policy or practice absent a direct link to an airline's decisions involving rates or routes. *See Charas*, 160 F.3d at 1261, 1265-66. It follows that a claim that an airline wrongfully denied a passenger boarding – even if based on an airline's policy related to such things as overbooking, disability, or intoxication – would not be preempted.[10] *See Newman v. American Airlines, Inc.*, 176 F.3d 1128, 1131 (9th Cir. 2000) (applying *Charas* and holding that discrimination claim based on refusal to board passenger with heart condition absent medical certificate was not preempted because it did not relate to routes or rates). Indeed, states would be free to adopt regulations micro-managing such matters as whether airlines may permit first-class passengers to board first.

---

[10]Under the Ninth and Third Circuit's narrow definition of services, states apparently are now free to pass laws *directly* regulating most aspects of air travel including not only laws prescribing boarding procedures but also, for example, laws that would limit the number of allowed carry-on bags, the number of alcoholic beverages served or the categories of in-flight entertainment available in each cabin of the plane. It could be argued that none of these relates to prices or routes and thus none is preempted.

By contrast, the Fourth Circuit had little difficulty concluding that, under the principles set forth in *Hodges* and *Travel All Over the World,* boarding practices are a "service" under the ADA, and a claim based on refusing to allow a passenger to board due to a ticket agent's failure to check for photo identification is preempted. *See Smith*, 134 F.3d at 259; *see also Hodges*, 44 F.3d at 336 (defining "services" to include "boarding practices" and reaffirming Fifth Circuit precedent that such claims are preempted).

Other examples, involving state regulation of policies ranging from food and beverage service to baggage handling to flight security, could easily be elaborated. In each case, the split among the circuits means that very different rules will apply in different places.

The bottom line point is that the nation's leading air carriers serve cities and passengers in every state, every day. It is intolerable that these carriers should simultaneously be subject to such divergent interpretations of controlling federal law – particularly when one of those interpretations undermines the very freedom of competition that Congress sought to preserve. Airlines should not have to tailor their operations to comply with the most restrictive state law rules that might be applied to a given flight. As Judge Easterbrook succinctly put it, "applying the conflicting tort principles of 50 different states to the[] interstate and international transactions [of air carriers] would make a mess of things. Preemption under § 105(a)(1) enables a system of private law, with nationally uniform overrides, to flourish." *Mesa Airlines*, 219 F.3d at 611.

II. The Ninth Circuit's Rules Are Particularly Problematic Because They Expose Airlines to Forms of State Regulation Congress Clearly Intended to Preempt.

In addition to the need to resolve the conflict among the circuits, the need for review in this Court is especially pronounced because the Ninth Circuit's approach is clearly wrong. First, as a textual matter, the Ninth Circuit's interpretation of the word "service" reads that word out of the ADA altogether. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.). *See also Exxon Corp. v. Hunt*, 475 U.S. 355, 369 n.14 (1986) (rejecting reading of statute that would render word superfluous). Nevertheless, the Ninth Circuit has adopted a definition of the word "service" that renders it entirely redundant of the immediately preceding word "route." Pet. App. 5a ("'service,' when juxtaposed to 'rates' and 'routes,' refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided . . . ." (quoting *Charas*, 160 F.3d at 1265-66)).

Indeed, the Ninth Circuit explicitly refused to broaden its definition of "service" to include an airline's *policies* to provide the many services and amenities that help to distinguish one airline from another in the competitive marketplace. *See* Pet. App. 5a-6a. Such policies undeniably affect the airlines' ability to compete both domestically and abroad. *See* 49 Fed. Reg. 25408, 25412 (June 20, 1984) ("While no-smoking restrictions are important, the government should not impose restrictions on airlines that hamper their growth *or ability to compete*.") (emphasis added). In the Ninth Circuit, however, if an airline's policies conflict with the policies of any given state, that state's

laws and policies will control. That is flatly contrary to the intent of Congress in enacting the ADA's preemption provision. As this Court has explained, the ADA's preemption provision "is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" *Wolens*, 513 U.S. at 229 n.5 (quoting and adopting brief of United States as *amicus curiae*). But the ruling below endorses just such an imposition. At least where, as here, such a policy has been implemented to meet and hopefully surpass the competition, it should be immune from state regulation. *See id.* at 226 (holding that state fraud claim would affect the "service" of frequent flyer class upgrades); *Morales*, 504 U.S. at 378 (recognizing that ADA was designed to "'promote maximum reliance on competitive market forces'" (quoting 49 U.S.C. App. § 1302(a)(4)).[11]

In adopting its restrictive interpretation of the term "service," the Ninth Circuit also ignored the contemporaneous interpretation of that term by the Civil Aeronautics Board, which explicitly *included* services not directly related to fares or routes, such as "reservation and boarding practices, insurance, *smoking rules*, meal service, entertainment . . . minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages,

---

[11]This must be contrasted with state personal injury suits alleging the *negligent rendition* of an airline's services by an errant employee. Such suits deter only the employee's negligent conduct. They would not regulate the airline by deterring it from having such a policy going forward and, therefore, would not be preempted under the ADA. *See, e.g., Hodges*, 44 F.3d at 339-40; *Woodson*, 67 F. Supp. 2d at 557 (tort claim not preempted where it would not force airline to alter a "practice," "procedure" or "service" related to boarding).

entertainment, and excess baggage." 44 Fed. Reg. 9948, 9951 (Feb. 14, 1979) (emphasis added). That administrative interpretation is entitled to judicial deference.

Perhaps most striking of all is the Ninth Circuit's refusal to allow preemption of any tort claim even if it would have the indirect effect of forcing the airline to alter the routes it chooses to fly. *See* Pet. App. 6a-7a. This unyielding interpretation is patently inconsistent with this Court's repeated emphasis that state enforcement actions are preempted even if their effect on an airline's rates, routes or services is *indirect*. *See Morales*, 504 U.S. at 386.

In sum, although the particular airline policy at issue in this tort case may have been foreclosed prospectively by new federal smoking regulations, *see supra*, p. 3 n.1 there remains an urgent need for action by this Court to clarify the law and rectify the approach adopted by the Ninth Circuit. This case, because it involves an airline policy not directly related to fares or routes but unquestionably related to airline competition, would be an excellent vehicle for addressing the multifaceted circuit conflict. A resolution would also be very timely, in view of the fact that the conflict has "matured" to the point where it is intractable and is causing real practical problems for national air carriers attempting to determine which state laws apply to them.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

TOM TINKHAM
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2829

PAUL M. SMITH*
MICHAEL B. DeSANCTIS
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

DAVID P. SANDERS
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Petitioner
*Counsel of Record

September 13, 2000

APPENDIX

APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Julie DUNCAN, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

NORTHWEST AIRLINES, INC.,

Defendant-Appellee.

No. 98-35617.

Argued and Submitted Dec. 7, 1999

Filed April 6, 2000

Before: REAVLEY,[1] REINHARDT, and McKEOWN, Circuit Judges.

REINHARDT, Circuit Judge:

In this case, we must determine whether a class-action tort suit brought against Northwest Airlines by some of its flight attendants is preempted by the Airline Deregulation Act. We hold that it is not.

I. BACKGROUND

Julie Duncan, as the named plaintiff, filed a class-action, personal-injury lawsuit against Northwest Airlines in Washington state court. Brought on behalf of nonsmoking flight attendants who served as crew members on Northwest's smoking flights to and from Asia, the suit raises a claim based

---

[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

on Northwest's smoking policy. At the time the action was filed, Northwest prohibited smoking on all domestic and most international flights, but permitted smoking on most flights to and from Asia.[2] In her complaint, Duncan argued that, by permitting smoking on most trans-Pacific flights, Northwest breached its duty under state law to provide a safe and healthy work environment for its employees. She further alleged that Northwest's decision to allow smoking on these flights injured the flight attendants by exposing them to secondhand smoke. The complaint sought damages, an injunction, and medical monitoring.[3]

Northwest removed the suit to federal court and filed a motion to dismiss, asserting that Duncan's action was preempted by § 1305(a)(1) the Airline Deregulation Act (ADA). The district court granted Northwest's motion and dismissed the case. Duncan appealed. After the appeal was filed, Northwest banned smoking on all trans-Pacific flights.

---

[2] Prior to 1988, nearly every airline permitted smoking on both domestic and international flights. Smoking policies began to change in 1988, when a federal statute banned smoking on some domestic flights. Since then, a combination of statutory prohibitions, international agreements, and voluntary efforts by airlines have made nonsmoking domestic and international flights the rule rather than the exception.

[3] Both Duncan and Northwest agree that Duncan abandoned her claim for injunctive relief before the district court. In any event, her request for injunctive relief would now be moot, given that Northwest no longer permits smoking on its trans-Pacific flights.

II. DISCUSSION

On appeal, we must determine whether Duncan's tort suit is preempted by § 1305(a)(1) of the ADA. Section 1305(a)(1) provides:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to the rates, routes or service* of any air carrier.... [4]

49 U.S.C. app. § 1305(a)(1) (emphasis added). The scope of preemption under this provision depends on the interpretation of the phrase "relating to the rates, routes or service."[5] When the district court dismissed Duncan's suit, the meaning of this phrase--and hence the scope of preemption under section 1305(a)(1)--was uncertain both in this circuit and others.

---

[4] In 1994, section 1305(a)(1) of the ADA was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. *See* 49 U.S.C. § 41713(b)(1). As amended, the provision reads in relevant part: "[A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." Because the minor amendments are nonsubstantive, for convenience we will continue to refer to the provision as § 1305(a)(1) of the ADA.

[5] Obviously, an action is preempted only if it also satisfies the other requirements of § 1305(a)(1). For purposes of the present appeal, we assume that a court ruling that granted relief in Duncan's suit would constitute the enforcement by Washington of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. app. § 1305(a)(1).

While Duncan's appeal was pending, we substantially clarified the scope of § 1305(a)(1) preemption in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc).[6] In that case, we provided a definitive interpretation of the term "service": we concluded that "Congress used the word 'service' in the phrase 'rates, routes, or service' in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail."[7] *Id.* at 1261. This interpretation was mandated by the purpose and language of the preemption provision. First, we determined that "in enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry. Congress did not intend to preempt passengers' run-of-the-mill personal injury claims."[8] *Id.* Accordingly, we interpreted the term

---

[6] For a detailed description of the evolution of ADA preemption doctrine in this circuit, see *Charas*, 160 F.3d at 1262-63.

[7] We also expressly overruled our earlier decisions in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995), and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997), to the extent that those decisions were inconsistent with our new decision.

[8] One might argue that, because the quoted passage mentions only *passengers'* personal injury claims, *Charas* is inapplicable to personal injury claims brought by others, such as flight attendants. However, we stated that *passengers'* claims were not preempted because the claims before us were all filed by passengers. The logic of *Charas* does not support a distinction between passenger plaintiffs and other plaintiffs. The opinion turns on the effect of a lawsuit on certain aspects of the defendant airlines' business, not on the role of the plaintiff who brought the lawsuit. Moreover, any such argument is rebutted by the fact that, in its conclusion, *Charas* holds that "[Congress] did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct." 160 F.3d at 1266. Nothing in this statement suggests that we intended the holding in *Charas* to be limited to suits brought by passengers.

"service" narrowly in order to prevent the "preemption of virtually everything an airline does." *Id.* at 1266. Second, our interpretation of the term "service" was guided by the context in which the term was used:

> Airlines' "rates" and "routes" generally refer to the point-to-point transport of passengers. "Rates" indicates price; "routes" refers to courses of travel. It therefore follows that "service," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided....
>
> ....
>
> [Thus,] [l]ike "rates" and "routes," Congress used "service" in § 1305(a)(1) in the public utility sense--i.e., [to refer to] the provision of air transportation to and from various markets at various times.

Id. at 1265-66. We concluded that, "[i]n the context in which it was used in the Act, 'service' was not intended to include an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* at 1261.

Given our holding in *Charas*, it is clear that allowing smoking on Northwest's trans-Pacific flights does not constitute a "service." An airline's decision to permit (or not to permit) smoking on a flight is not a decision dealing with "the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66. Rather, like the

decision to offer in-flight beverages, a rule permitting or prohibiting smoking deals with what we termed, for want of a better word, "amenities." Northwest contends that, even if permitting smoking does not itself constitute a service, Duncan's action is still preempted by § 1305(a)(1) because it "relates to" a "service." The airline's argument proceeds in two parts. First, it contends that the result of permitting Duncan's lawsuit to proceed might be to force Northwest to prohibit smoking on any trans-Pacific flights that originate in Washington State. It argues that this forced prohibition, in turn, might compel Northwest, for economic reasons, to drop its trans-Pacific departures from Washington and reroute its other trans-Pacific flights around the state. The airline argues that this causal relationship between Duncan's tort suit and its provision of "services" renders her claim "related to" a "service."

Northwest's argument about the causal connection between its smoking policy and its ability to profit on the trans-Pacific routes is unpersuasive. As noted above, Northwest stopped allowing smoking on its trans-Pacific flights while Duncan's appeal was pending. In spite of its smoking prohibition, Northwest has not canceled its trans-Pacific flights. Thus, the airline's own business decision demonstrates conclusively that, even if Duncan's suit had forced it to prohibit smoking on flights originating in Washington (and perhaps it did), the airline would not have had to cancel its Washington-based trans-Pacific departures and reroute its other flights.

Moreover, the type of causal relationship to a "service" alleged by Northwest is not sufficient to invoke preemption under § 1305(a)(1). If it were, then, contrary to *Charas*, almost all personal injury claims would be preempted. This is because

all successful tort suits--and certainly all successful class-action tort suits--invariably carry with them an economic cost for the defendant airline. Such cases may even, in some instances, cause the airline to decide to make changes in its operations. *Charas* makes clear, however, that the imposition of liability as a result of a personal injury action does not sufficiently interfere with the objectives of airline deregulation to warrant preemption of the action--in other words, the connection between an award in a tort case and an airline's "services" is simply too tenuous. *See* 160 F.3d at 1261, 1266; *see also Newman v. American Airlines*, 176 F.3d 1128, 1131 (9th Cir. 1999). *Cf. Morales v. Trans World Airlines*, 504 U.S. 374, 378, 112 S. Ct. 2031, 119 L. Ed.2d 157 (1992) (holding that state actions are not preempted if they affect rates, routes, or services "in too tenuous, remote, or peripheral a manner" (internal quotation omitted)).

Finally, Northwest argues that *Read-Rite Corp. v. Burlington Air Express*, 186 F.3d 1190 (9th Cir.1999), somehow compels a different result. *Read-Rite*, however, provides no support for Northwest's position. *Read- Rite* concerned the law governing the loss of or damage to goods transported by interstate common carriers. In that case, we held that "state law regulating the scope of air carrier liability for loss or damage to cargo is preempted by the ADA." *Id.* at 1197. The crux of our holding was that claims arising from damage by common carriers had been governed by a purely federal regime for nearly the entire century. We described that regime as follows: "federal regulation by statute, federal preemption of state regulation, and regulation by federal common law of matters not covered by federal statute." *Id.* at 1196. Unlike personal injury claims, which *state tort law* has traditionally governed, *federal law* governed the claims at issue in *Read-Rite* prior to the enactment of the ADA. Consequently, *Read-Rite*'s

finding of preemption after the ADA's enactment simply maintained the regulatory status quo ante. Because it did not address the question of when preemption within a field that the states have traditionally occupied is appropriate--the question at issue in both *Charas* and the present case--*Read-Rite* is of no relevance here.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's conclusion that Duncan's suit is preempted by § 1305(a)(1) of the ADA, hold that the provision does not preempt Duncan's action, and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff, vs. NORTHWEST AIRLINES, INC., Defendant.	No. C98-130Z ORDER Filed June 5, 1998

Julie Duncan, a flight attendant for Northwest, alleges negligence under Washington state law based on Northwest's policy permitting smoking on its Transpacific flights. Duncan seeks: 1) to enjoin passengers from continuing to smoke on those flights; 2) to recover damages resulting from exposure to secondhand smoke on those flights; and 3) to establish a fund for medical monitoring flight attendants who worked the Asia flights. Northwest Airlines moves to dismiss Duncan's complaint on grounds that it is preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713 (b) (1994). The Court grants Northwest's motion.

I. DISCUSSION

Although it has banned smoking at its corporate headquarters and on its domestic and trans-Atlantic flights, Northwest Airlines continues to allow smoking in designated

areas on most of its flights to and from Asia and within Asia. Julie Duncan is a flight attendant for Northwest and has worked on the Asian flights where smoking is allowed. Ms. Duncan, on behalf of herself and all similarly situated flight attendants, claims that Northwest owes a duty to its employees to provide a safe work environment, including an environment free of harmful tobacco smoke and that Northwest's refusal to ban smoking is a breach of this common law duty. Northwest argues that Duncan's claim under Washington law is preempted by § 105 of the Airline Deregulation Act.

Section 105 of the ADA provides that:

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law, related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713 (b)(1) (1994).

There are two questions at the heart of whether § 105 preempts Duncan's state law claims. The first question is whether application of the state's common law of negligence constitutes the enactment or enforcement of "a law, regulation, or other provision having the force and effect of law." 49 U.S.C. § 41713 (b)(1). The second question is whether the claim "relates to rates, routes or service" or merely involves the regulation of operation or maintenance of the aircraft. Ninth Circuit precedent makes clear that assertions of preemption rise or fall upon these determinations and both Duncan and Northwest acknowledge that these are fundamental in determining the pending motion.

A. Enforcement or Enactment of a Law, Regulation or Provision Having the Force of Law

The Supreme Court has recognized that the preemptive scope of § 105 extends well beyond state statutes directly targeted at the airline industry. *See American Airlines v. Wolens*, 513 U.S. 219, 222-23 (1995). In *Wolens*, the Court held that, although plaintiffs' cause of action for breach of contract was not preempted by § 105, a claim under Illinois's generally applicable Consumer Fraud Act was preempted. According to Duncan, *Wolens*, proves that Congress "did not intend to occupy the field of airplane safety to the exclusion of state common law." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993). But the Supreme Court's reason for allowing the breach of contract suit to go forward under state law does not support allowing Duncan's negligence suit to go forward. The Supreme Court was careful to note the "distinction between what the State dictates [by way of substantive tort standards, for example] and what the airline itself undertakes" through the terms of its contract. *Wolens*, 513 U.S. at 233. The Court then reasoned that the very terms of the contract "confine[] the courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.*

Likewise, Washington state's common law duty to provide employees with a sufficiently smoke-free work environment, *McCarthy v. Dept. of Social & Health Servs.*, 110 Wn. 2d 812 (1988), does more than "simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 233. It would impose a state-created affirmative duty upon Northwest to alter its own smoking policies on its

international flights. Such a state-imposed duty interferes with the purpose behind ADA preemption, which is to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and prices of air services." H.R. Cong. Rep. No. 95-1779, 95th Cong. (1978); *see* ADA, 49 U.S.C. § 1302(a)(4), (a)(9) (1990).

The Ninth Circuit has recognized that claims founded on state common law of negligence fall within the preemptive scope of the ADA. *See Gee v. Southwest Airlines*, 110 F.3d 1400, 1404 (9th Cir. 1997); *Harris v. American Airlines*, 55 F.3d 1472, 1476 (9th Cir. 1995). Although it was not discussed expressly, the Ninth Circuit in *Gee* and *Harris* necessarily concluded that to hold an airline liable under state common law of negligence would be to "enforce a law, regulation, or other provision having the force and effect of law" when it held certain negligence claims to be preempted. *See Gee*, 110 F.3d at 1404; *Harris*, 55 F.3d at 1476. Duncan's claim for negligence under Washington state law, therefore, is exactly the type of action that triggers § 105's preemption.

B. "Service" or Operation and Maintenance

The more difficult inquiry is whether Northwest's smoking policy constitutes a competitive "service" for the purpose of § 105 preemption. The Ninth Circuit has found a relatively broad range of common law tort claims to be sufficiently linked to an airline's services so as to preempt the claims. *See Gee*, 110 F.3d at 1404 (negligence claim based on providing passengers with too many drinks and failing to provide assistance to disabled passenger are preempted); *Harris*, 55 F.3d at 1476-77 (negligence claim based on failure to control unruly passenger preempted).

In *Harris*, the Ninth Circuit held a woman's state law negligence claim based upon a flight attendants continuing to serve an intoxicated passenger who was harassing her was preempted by the ADA. The court concluded that Harris' claims "pertain[ed] directly to a 'service' the airlines render; the provision of drink." *Id.* at 1476. The Ninth Circuit relied in large part upon the Supreme Court's expansive reading of the ADA's preemptive power in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). In *Morales*, the Supreme Court held that the preemptive scope of the ADA's "relating to rates, routes, or service" language to the preemptive provision in ERISA, 29 U.S.C. § 1144(a), which preempts all state laws "insofar as they . . . relate to any employee benefit plan." *Id.* at 383. Having found such a broad preemptive purpose, the Court held that any "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted." *Id.* Although *Harris* remains intact, the Ninth Circuit has since backed away from such a broad interpretation of the ADA's preemptive scope. *See Gee*, 110 F.3d at 1404-05. In *Gee*, the Ninth Circuit held that claims of emotional distress based on a flight attendant's failure to stop serving alcohol to an intoxicated passenger and claims arising out of a flight attendant's failure to assist a disabled passenger were sufficiently related to service to be preempted under the ADA. *Id.* at 1406. Claims arising from an injury suffered when a flight attendant failed to secure the latch on a drink cart's door, however, were found to be related to the operation or maintenance of the plane rather than to services and were not preempted. *Id.* at 1407. Likewise, a claim for injuries suffered when an item fell from the overhead bin were not sufficiently related to services to be preempted. *Id.*

Gee recognized the importance of considering the ADA's goals of airline deregulation as they relate to specific claims in

determining the scope of preemption. *Id.* at 1404 (citing *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). The court in *Gee* recognized that post-*Harris* decisions of the Supreme Court had indicated both that the scope of preemption under the ADA's "relates to rates, routes, and service" language may not be so broad. *Id.* at 1405 (citing *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645 (1995)).

In *Travelers*, the Supreme Court adopted an approach to preemption contrary to what the Ninth Circuit did in *Harris* and contrary to the approach that it had previously taken in *Morales*. *Travelers*, 514 U.S. at 657. The *Travelers* Court explained that the preemption analysis must start from the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear manifest purpose of Congress." *Id.* at 655. Such a presumption against preemption runs contrary to *Harris*, where the Ninth Circuit established a presumption that all claims related to services were preempted, from which the court would later carve exceptions such as breach of contract claims. *See Harris*, 55 F.3d at 1477. Moreover, to the extent that *Harris* relied upon *Morales*' broad, ERISA-based interpretation of the scope of preemption, *Travelers* altered the yardstick of preemption in the ERISA context. The Supreme Court noted that if the phrase "relate to" is extended to "its furthest reach of indeterminacy, then for all practical purposes preemption would never run its course." *Travelers*, 514 U.S. at 655.

The Supreme Court's "backtracking" from *Morales* and the Ninth Circuit's subsequent criticism of its own reasoning in *Harris* does not alter the result in this case. This court need not rely upon *Harris* to its fullest extent in finding that Duncan's claims are preempted. Northwest's smoking policy does not

relate to a service in an indeterminate way. The Civil Aeronautics Board, when implementing the ADA's preemption provision, recognized expressly that smoking policies were within the preemptive scope of § 105.44 Fed. Reg. 9948, 9951 (1979). The Board explained that § 105 precludes states from interfering "with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, . . . alcoholic beverages, entertainment, and excess baggage would clearly be 'service' regulation within the meaning of section 105." 44 Fed. Reg. 9948, 9951 (1979). The Board provided even more directly implicated claims such as Duncan's in its conclusion of what is preempted by § 105: "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the quid pro quo for passenger's fare, including . . . smoking-rules." *Id.* Likewise, in *Diefenthal v. Civil Aeronautics Board*, 68 F.2d 1039, the court held that the regulation of smoking was authorized under the Airline Deregulation Act as related to the kind or quality of service which a carrier provides. *Id.* at 1044.

The Civil Aeronautics Board regulations and the Ninth Circuit's holdings in *Harris* and *Gee* indicate that Northwest Airlines' policy of allowing smoking on its trans-Pacific routes is a function of its service for the purposes of § 105 of the ADA. Although Washington state has an interest in assuring safety in Ms. Duncan's workplace, the ADA makes clear that this interest must yield to the federal interest in "encourag[ing], develop[ing], and attain[ing] an air transportation system which relies on competitive market forces to determine the quality, variety, and prices of air services." H.R. Cong. Rep. No. 95-1779, 95th Cong. (1978). Providing customers with the option to smoke in designated areas of the plane is regrettably a part

of the "quid pro quo" for some passengers' fare. 44 Fed. Reg. at 9951. And to the extent that Northwest must maintain smoking sections on its Trans-Pacific flights in order to compete with Asian carriers, this service is one of the competitive market forces" upon which Northwest relies.

Duncan attempts to escape preemption by characterizing the cause of her injuries as "Northwest's failure to properly operate and maintain the aircraft by allowing the cabin to fill with toxic fumes." Duncan claims that, as in *Gee*, the "claim does not relate to airline 'service' but rather is connected with the failure to take appropriate safety measures relating to the operation of the aircraft" *Gee*, 110 F.3d at 1407. However, Duncan does not point to any instrumentality or mechanical element of the airplane that malfunctioned or was improperly operated by the crew. In *Gee*, the claims that were not preempted all involved the crew's improper *operation* of the aircraft. Those claims that were part of the bargained-for service provided to passengers were not preempted. Because Northwest's smoking policies are part of the competitive package that the airline offers in its quid pro quo with passengers, claims arising from those policies are preempted.

The Fifth Circuit cases of *Smith v. America West Airlines. Inc.*, 44 F.3d 344, 346-47 (5th Cir. 1995) and *Hodges v. Delta Airlines. Inc.*, 44 F.3d 334, 338 (5th Cir. 1995) are harmonious with Ninth Circuit distinction between service and operations and maintenance, and do not require a different result *Gee*, 110 F.3d at 1407. In *Smith*, the court was confronted with a state law personal injury claim based on the airline's permitting a visibly deranged man to board the plane. The court relied heavily upon the purpose of the Airline Deregulation Act in determining the scope of preemption. The court noted that § 150 "assured the economic deregulation of the airlines by

rendering them immune from rate and service regulation by the states after the demise of federal regulation. Neither the language nor history of the ADA implies that Congress was attempting to displace state personal injury tort law concerning the safety of the airline business." The court concluded that, if they had ultimately recovered, the Smiths' claim "could affect the airline's ticket-selling, training or security procedures, but it would not regulate the economic or contractual aspects of boarding [the plane]. Any such effect would be 'too tenuous, remote or peripheral' to be preempted by §1305(a)(1)." *Smith*, 44 F.3d at 347 (quoting *Shaw v. Delta Air Lines. Inc.*, 463 U.S. 85, 100 n. 21(1983)). The court in *Smith* did preempt claims for the negligent rendition of service by an air carrier. *Id.* After noting that the real question is the scope of services that §105 was intended to reach, the court concluded that "those services include boarding practices and their economic and contractual dimension but not insofar as the safety of the flight is involved." *Id.*

In conclusion, the Court concludes that the Northwest smoking ban relates to services that require preemption under the Airline Deregulations Act. Accordingly, the Court GRANTS the motion to dismiss and directs the Clerk to enter final judgment pursuant to this Order.

IT IS SO ORDERED.

DATED this 5th day of June, 1998.

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Western District of Washington

JUDGEMENT IN A CIVIL CASE

JULIE DUNCAN

v. CASE NUMBER C98-130Z

NORTHWEST AIRLINES, INC.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

The Court GRANTS the defense motion to dismiss.

Judgment is hereby entered in favor of the defendant with costs and with prejudice.

BRUCE RIFKIN, Clerk
By /s/Casey Condon
Casey Condon
Deputy Clerk

June 11, 1998
Date

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. NORTHWEST AIRLINES, INC., Defendant-Appellee.	No. 98-35617 D.C. No. CV-98-00130-TSZ ORDER Filed June 16, 2000

Before: REAVLEY,[1] REINHARDT, McKEOWN,
Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Reinhardt and McKeown voted to deny the petition for rehearing en banc, and Judge Reavley so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

---

[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

APPENDIX D

FROM TITLE 49. TRANSPORTATION
SUBTITLE VII--AVIATION PROGRAMS
PART A--AIR COMMERCE AND SAFETY
SUBPART II--ECONOMIC REGULATION
CHAPTER 417--OPERATIONS OF CARRIERS
SUBCHAPTER I--REQUIREMENTS

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.--In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.--(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.--

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).--This paragraph shall not limit the applicability of paragraph (1).

APPENDIX E

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

JULIE DUNCAN, on behalf of herself and all others similarly situated, Plaintiff, v. NORTHWEST AIRLINES, INC., Defendant.	No. 98-2-01158-1SEA Class Action Complaint for Injunctive Relief, Medical Monitoring and Damages

Plaintiff Julie Duncan alleges, upon personal knowledge and belief as to her own act and upon information and belief based on investigation of counsel as to all other matters, as follows:

* * * *

4. Northwest's reason for allowing smoking, especially on flights to and from Japan, is its profit motivation. Northwest's decision is based on feedback from key corporate accounts who have indicated that allowing smoking on certain routes is essential to retaining their business.

* * * *

35. Northwest's reason for maintaining "smoking" flights especially between the United States and Japan is a result of a corporate decision to favor the desire to key corporate

accounts over the health of its employees. In other words, profit is more important than the health of Northwest's flight crew members, who are continually subjected to smoke-filled cabins on long flights over the Pacific.

* * * *